

Gertskis, 77 OCB 11 (BCB 2006)

[Decision No. B-11-2006(IP)] (Docket No. BCB-2517-05).

Summary of Decision: Petitioner claimed that the Union breached its duty of fair representation when it failed to acquire, examine, test, and obtain an expert opinion on certain documents she requested for her arbitration and colluded with the City during the arbitration. Petitioner also alleged DOH interfered with her right to file a grievance by altering documents important to that grievance. The Board found that the Union did not breach its duty of fair representation and that the City did not interfere with Petitioner's rights under NYCCBL § 12-305. (***Official decision follows.***)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Proceeding

-between-

PAULINA GERTSKIS,

Petitioner,

-and-

**LOCAL 375, DISTRICT COUNCIL 37, AFSCME,
& THE CITY OF NEW YORK DEPARTMENT OF
HEALTH AND MENTAL HYGIENE,**

Respondents.

DECISION AND ORDER

On November 14, 2005, Paulina Gertskis filed a verified improper practice petition against District Council 37, Local 375, AFSCME (“Local 375” or “Union”) and the New York City Department of Health and Mental Hygiene (“DOH”). The petition alleges that the Union breached its duty of fair representation, in violation of § 12-306(b)(3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”), when the

Union failed to acquire, examine, test, and obtain an expert opinion on, certain documents she requested for her arbitration, and colluded with the City during the arbitration. Petitioner also claims that DOH interfered with her right to file a grievance and discriminated against her for filing the grievance by altering documents important to her claim, in violation of NYCCBL § 12-306(a)(1). The Union and DOH claim that the petition fails to set forth facts sufficient to state a violation of the NYCCBL. The Board finds that the Union did not breach its duty of fair representation and that the City did not interfere with Petitioner's rights under NYCCBL § 12-305.

BACKGROUND

Petitioner holds the civil service title of Assistant Chemist at the Public Health Laboratory of the DOH. On October 30, 2003, Petitioner filed an out-of-title grievance at Step I. The Step I through Step III grievance forms, each signed by Petitioner, claim that she was performing the duties of an Associate Chemist, Level I. The Union represented her during the grievance process.

Petitioner asserts that on July 15, 2005, she discovered that information on her Status Log Sheets, which she believed was important to her arbitration, had been falsified. Status Log Sheets record information on test results, including which analyst ran the test, and must comply with state and federal regulations. On July 20, 2005, Petitioner delivered photocopies of the documents to the Union's legal department and spoke with a grievance representative.

On July 27, 2005, Petitioner spoke with the Union attorney handling her grievance regarding Petitioner's desire to have the documents examined in preparation for her upcoming arbitration. Petitioner claims that the Union attorney stated that she would review the documents if she had the time, and Petitioner told the Union attorney that she was unhappy with the way her grievance was

being handled. The Union claims that the attorney informed Petitioner that the attorney would not be able to review the documents immediately but would review them as soon as possible, and that, if she was unhappy with the representation, another attorney could be assigned to the case.

The Union claims that, in anticipation of the arbitration, the Union attorney met with Petitioner on at least four different occasions. Petitioner denies those claims. On several occasions prior to the arbitration, Petitioner asked the Union attorney to obtain the original Status Log Sheets and have an expert witness testify regarding the documents at the Union's expense. The Union attorney declined her requests since the attorney believed that the documents had not been forged and did not believe that the documents were materially relevant to the grievance. The Union asserts that the attorney told her that she was free to pay for an expert witness on her own, but Petitioner claims that when she eventually expressed a desire to do so, the Union did not permit her.

On August 19, 2005, Petitioner wrote to the President of the Union to complain about the way the Union was handling her grievance. Petitioner did not receive a response.

In September 2005, Petitioner contacted Peter F. Backman, the Assistant Commissioner of Public Health Laboratories for DOH and complained that her Status Log Sheets had been altered. Backman submitted a sworn affidavit which states that, because of the seriousness of the allegation, he ordered an investigation into the matter by the Quality Management Unit ("QMU"), which is responsible for assuring that DOH's laboratories comply with state and/or federal record-keeping regulations. QMU determined that there was no evidence that the Status Log Sheets had been tampered with and/or altered, and a member of the QMU met with and explained the results to Petitioner.

Petitioner retained her own lawyer, who wrote a letter to the President of the Union on

November 4, 2005, five days before the arbitration was scheduled, to again complain about the Union's handling of her grievance and to ask that the Union request an adjournment of the arbitration so that the Status Log Sheets could be obtained and analyzed. The Union attorney responded to the letter on that day. In the letter, the Union attorney stated that her office had spent many hours reviewing and preparing the grievance and that the case was ready to go forward on November 9.

On November 9, the arbitration hearing was held. At the arbitration, the Union argued that Petitioner performs complex assignments independently and with wide latitude for independent judgment and called Petitioner to testify in support of her claim. Petitioner testified about her job duties, which, at the relevant time, primarily included performing three types of tests on blood samples. She testified regarding the procedures involved for each test, which involved complex calibrations, calculations, and computer work, and testified how her duties compared to those of Associate and Assistant Chemists. She also testified about how she believes her duties were lessened after she filed her out-of-title grievance.

Petitioner contends that when the City's attorney described her claim as one for performing the work of an Associate Chemist Level I, Petitioner responded that her claim was for Associate Chemist Level II, but the Union attorney agreed with the City's attorney. Petitioner also contends that, during a break, the Union attorney argued with her, trying to convince her that she was wrong about the level at which the grievance was filed. She alleges that when they returned, without an explanation to Petitioner, the Union attorney abruptly changed and asked that the arbitrator consider that Petitioner was performing the duties of an Associate Chemist Level II. The Union claims that during numerous conversations with Petitioner, the Union attorney believed that the claim was for Associate Chemist Level I, but the attorney asked for an alternate remedy of Associate Chemist

Level II at the arbitration at Petitioner's request.¹ The arbitrator noted in her award that the Union argued, and Petitioner asserted, that her job duties were most nearly consistent with those of an Assistant Chemist Level II.

Petitioner claims that during her testimony at the arbitration, she began to testify about the Status Log Books that she believes had been falsified. At that point in the hearing, the City attorney called out the name of the Union attorney. Petitioner contends that it appeared as though the City attorney was telling the Union attorney to stop her from speaking about the falsified documents, and the Union attorney immediately changed the line of questioning. The Union asserts that at the time, Petitioner attempted to testify when no question had been posed to her about documents that would make no difference to the outcome of the grievance.

Petitioner further contends that she noticed that a City witness was giving false testimony and that when the Union attorney saw her taking notes on the testimony, the Union attorney took her out of the room in the middle of his testimony. Petitioner contends that while they were outside, the Union attorney tried to convince her that the testimony was unimportant, and when they returned to the room, the witness had finished testifying. The Union contends that the Union attorney took Petitioner outside after the witness's direct examination had concluded and had determined that cross-examination of the witness was not necessary.

The arbitrator denied the grievance on December 21, 2005. The arbitrator noted that

¹ The Step I through Step III grievance forms, each signed by Petitioner, state a claim was that she was performing the duties of an Associate Chemist, Level I. Petitioner produced an undated electronic mail, which she claims was sent on April 9, 2005, to the Union's attorney, stating that she feels strongly confident that she is performing the work of an Associate Chemist, Level II.

Petitioner gave testimony about her duties both before and after her grievance was filed and that the Union produced numerous documents that substantiate the type of work Petitioner performs, which allegedly falls within the scope of the duties of Associate Chemist Level II. However, the arbitrator found that Petitioner's duties, as described in her testimony, were not substantially different from those set forth in the job specification for the title Assistant Chemist.

As a remedy in the instant matter, Petitioner seeks damages resulting from Respondents' violations of NYCCBL § 12-306 and attorney's fees.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner alleges that the Union violated NYCCBL § 12-306(b)(3) by failing to acquire, examine, test, and obtain an expert opinion regarding the authenticity of, the Status Log Sheets and by colluding with the City during her arbitration.² Petitioner argues that the Union, through its attorney, engaged in a pattern of arbitrary and bad faith conduct that violated her rights, including: refusing to undertake an investigation into falsification of decisive evidence by the City; refusing to request production of such evidence for examination at Petitioner's own expense after telling Petitioner that she could conduct such an examination if she wanted to; refusing to provide an explanation for the refusal; agreement with the City attorney's characterization of her grievance as one for Associate Chemist Level I; arguing with Petitioner before the arbitrator when Petitioner

² Section 12-306(b) of the NYCCBL provides:

It shall be an improper practice for a public employee organization or its agents:

* * *

(3) to breach its duty of fair representation to public employees under this chapter.

insisted on the inclusion of the Level II claim; trying to convince Petitioner that the claim had not been for Level II; changing the line of questioning when the City called out to the Union attorney; disregarding false testimony by the City's only witness; departing from the room during testimony by a City witness; intentionally failing to cross-examine the City's only witness; and deliberately failing to use the weakness of the City's case to its advantage in representing the Petitioner.

Petitioner argues that DOH engaged in improper practices in violation of NYCCBL § 12-306(a)(1) by interfering with her right to file a grievance and discriminating against her for exercising her right to file a grievance.³ Petitioner contends that she was discriminated against for filing a grievance when her name was removed from the Status Log Sheets. Petitioner claims that the fact that her name was deleted from the Status Log Sheets after the grievance was filed, combined with the absence of any rational justification for doctoring the records, leads to the inescapable conclusion that the log books were altered for the purpose of interfering with her grievance.

Petitioner also claims that the investigation by QMU regarding the authenticity of the documents was a sham because the investigation was done by a research scientist, not a document expert. The result of the investigation was predetermined before it began because it was conducted

³ Section 12-306(a) of the NYCCBL provides, in relevant part:

It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

* * *

Section 12-305 of the NYCCBL provides:

Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities

....

by individuals who needed to show that there had been no alteration of the documents.

Union's Position

The Union contends that the petition must be dismissed because it did not breach its duty of fair representation. Unless Petitioner shows that the Union did more for others in the same circumstances than they did for him or her or that its actions were discriminatory, arbitrary, or taken in bad faith, even errors in judgment such as faulty advice do not breach the duty.

The Union argues that in this matter the Union attorney met with and spoke to Petitioner on numerous occasions in preparation for the arbitration. After speaking to Petitioner and listening to her explanation why she thought the documents were important and had been tampered with, the Union attorney made a professional judgment that obtaining the documents and hiring an expert witness would be inappropriate for numerous reasons. The attorney determined that, in light of the nature of the grievance, the expense of having an expert analysis was not justified and that the documents, whether forged or not, were not materially relevant to the grievance. Thus, the Union's decision not to pursue the alleged forged documents was neither arbitrary nor in bad faith. The Union's attorney used her professional judgment and a rational cost-benefit analysis to determine that it was not in the Union's interest to pursue the alleged forgery.

Additionally, the Union contends that the Union attorney was not in collusion with the City. In the Union attorney's many conversations with Petitioner before the arbitration, it was always the attorney's understanding that the Union was asserting that Petitioner was performing the duties of an Associate Chemist Level I. However, after Petitioner requested that the Union re-characterize the claim to include the job duties of Associate Chemist Level II at the arbitration, the Union attorney amended the claim and submitted job specifications for Associate Chemist Levels I and II.

Thus, the arbitrator was urged, at Petitioner's request, to find that Petitioner was doing the work of an Associate Chemist Level II. Furthermore, the Union attorney made a strategic legal decision not to cross-examine the City's witness. Other than conclusory allegations of collusion, there is nothing in the petition that shows that the Union acted in bad faith or with improper motives.

City's Position

The City argues that the petition must be dismissed because Petitioner has failed to allege facts sufficient to find Respondents in violation of NYCCBL § 12-306(a)(1). Although Petitioner was engaged in protected union activity because she filed her grievance, she cannot show that her participation in union activity was the motivating factor behind the City's actions. Petitioner has not pled sufficient facts to establish that there was any action taken by the employer, much less action with improper motivation. Petitioner provides only a conclusory and speculative statement that the City falsified records to remove evidence of her work, discriminated against her for filing a grievance, and interfered with her grievance. However, Petitioner does not reference any facts that support an inference of interference or discrimination but merely recites that it is an "inescapable conclusion" that the City interfered with her grievance and discriminated against her. Petitioner was given the opportunity to fully litigate her grievance before an arbitrator and was represented by counsel at the hearing. Thus, Petitioner's claims of an action taken by the City, much less an improperly motivated action, are not factually supported and must be dismissed.

The City further argues that the petition must be dismissed because Petitioner has failed to allege facts sufficient to amount to a breach of the duty of fair representation in violation of NYCCBL § 12-306(b)(3).

DISCUSSION

The principal issue before the Board is whether the Union breached its duty of fair representation in handling Petitioner's grievance of October 30, 2003. We find that Petitioner has not alleged facts sufficient to state a *prima facie* case that the Union's conduct was arbitrary, discriminatory or founded in bad faith.

The Supreme Court in *Vaca v. Sipes*, 386 U.S. 171 (1967), defined the duty of fair representation:

Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

Id. at 177. A breach of this duty "occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190. Although the Court in *Vaca* was interpreting the National Labor Relations Act, the New York courts have adopted a similar standard in reviewing claims brought before the New York State Public Employment Relations Board:

In order to establish a claim for breach of the duty of fair representation against a union, there must be a showing that the activity, or lack thereof, which formed the basis of the charges against the union was deliberately invidious, arbitrary or founded in bad faith.

CSEA v. PERB and Diaz, 132 A.D.2d 430, 432 (3d Dep't 1987), *aff'd on other grounds*, 73 N.Y.2d 796 (1988); *see Trans. Workers Union, Local 100 (Brockington)*, 37 PERB ¶ 3002 (2004). Consistent with *Vaca*, *Diaz*, and their respective progeny, this Board has interpreted the duty of fair representation under NYCCBL § 12-306(b)(3) to require a union to refrain from arbitrary, discriminatory or bad faith conduct in negotiating, administering, and enforcing collective bargaining

agreements. *Burtner*, Decision No. B-1-2005 at 14.

Under the NYCCBL, a union enjoys wide latitude in the handling of grievances as long as it exercises discretion with good faith and honesty. *See Page*, Decision No. B-31-94 at 11; *Hug*, Decision No. B-5-91 at 14; *see also Brockington*, 37 PERB ¶ 3002. This Board will not substitute its judgment for that of a union or evaluate its strategic determinations. *See Grace*, Decision No. B-18-95 at 8; *Miller*, Decision No. B-21-94 at 14. A grievant's disagreement with a union's tactics or dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation. *Whaley*, Decision No. B-41-97; *White*, Decision No. B-37-96 at 6; *Brockington*, 37 PERB ¶ 3002.

Furthermore, Petitioners must allege more than negligence, mistake, or incompetence to meet a *prima facie* showing of a union's breach. *Schweit*, Decision No. B-36-98 at 15. Unless a petitioner shows that the Union did more for others in the same circumstances than it did for the petitioner, or that its actions were arbitrary or perfunctory, even errors in judgment do not breach the duty. *Id.*; *see Page*, Decision No. B-31-94 at 11. Petitioner has the burden to plead and prove that the union engaged in prohibited conduct. *See Minervini*, Decision No. B-29-2003 at 15-16.

Petitioner's primary complaint against the Union is that it did not attempt to acquire, examine, test, and obtain an expert opinion on her Status Log Sheets for her arbitration. This Board finds that the allegations that the documents were not acquired in preparation for the arbitration and that an expert witness was not obtained to testify regarding the documents concern the Union's strategy in presenting the grievance. Petitioner has failed to assert any facts to show that the Union's decision not to obtain the documents or expert testimony regarding them was arbitrary or perfunctory or that the Union did more for others than it did for her. The record shows that the Union called

Petitioner to testify at the arbitration hearing and admitted numerous other documents in support of her testimony. Assuming for the sake of argument that the disputed Status Log Sheets would have been consistent with Petitioner's testimony, the arbitrator nonetheless found that the duties to which Petitioner testified were not substantially different from those set forth in her job description. Under these circumstances, we decline to find that the Union attorney's decision not to pursue the issues regarding the Status Log Sheets, documents which, at best, would have corroborated Petitioner's testimony, was arbitrary or in bad faith.

Even if the Union's legal assessment was erroneous, the pleadings do not show that this exercise of its legal and strategic judgment violated its duty of fair representation. In the absence of the assertion of facts showing arbitrary, perfunctory, or bad faith conduct, the Board will not second-guess the Union's judgment.

Similarly, Petitioner has not alleged facts sufficient to show that the Union attorney's behavior at the arbitration breached the Union's duty of fair representation. Petitioner recites instances where she believes the Union did not take advantage of weaknesses in the City's case, such as challenging what she believed to be "false" testimony by a City witness and failing to cross-examine the City witness. Those allegations concern the Union's strategy in conducting the grievance, and Petitioner has failed to allege facts that would show otherwise, so there is no basis for this Board to question those decisions.

Petitioner also claims that the Union attorney argued with Petitioner in front of the arbitrator and left the room with Petitioner during a witness's testimony. These facts, if true, might, at most, support a finding that the quality of the Union's representation was poor, which would not constitute a breach of the duty of fair representation. *See also CSEA v. PERB and Diaz*, 132 A.D.2d at 432

(even grossly negligent conduct does not breach the duty of fair representation); *Brockington*, 37 PERB ¶ 3002 (negligence is insufficient to form the basis of a violation). Petitioner's assertions that the Union attorney was in collusion with the City attorney because of her conduct at the arbitration are speculative and conclusory and, without more, do not state a claim.

As for Petitioner's contention that the Union submitted the incorrect level of out-of-title claim, we note that the documents signed by Petitioner at Steps I through III of the grievance procedure claimed that she performed the duties of an Associate Chemist, Level I; that, at the arbitration hearing, the Union, at the urging of Petitioner, changed its position and asked the arbitrator to consider the Associate Chemist Level II claim; and that the arbitrator, in fact, did fully consider the Level II claim. Therefore, in any event, Petitioner was not prejudiced by the Union's actions.

Thus, the petition fails to allege facts sufficient to state a claim against the Union for a breach of its duty of fair representation in all respects and hereby is dismissed. Since we dismiss the claim against the Union, any potential derivative claim against the employer pursuant to NYCCBL § 12-306(d) must also fail.⁴ *Brown*, Decision No. B-30-2005 at 7.

The next issue in this case is whether, in violation of NYCCBL § 12-306(a)(1), the City's alleged falsification of Petitioner's Status Log Sheets constituted interference with her § 12-305 rights to engage in protected union activity. It is the policy of the City to favor and encourage the

⁴ NYCCBL § 12-306(d) provides:

The public employer shall be made a party to any charge filed under paragraph three of subdivision b of this section which alleges that the duly certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

right of municipal employees to organize and be represented. NYCCBL §§ 12-302, 12-305. A public employer commits an improper practice if it is found to interfere with such rights. *Local 1180, Communications Workers of America*, Decision No. B-28-2003; *District Council 37*, Decision No. B-23-2002.

Even assuming that Petitioner's allegation that her Status Log Sheets were falsified was true, she has not alleged facts sufficient to show that those actions would have interfered with her exercise of protected rights. Petitioner exercised her right to file a grievance and, although she was dissatisfied with her representation, was represented by her Union as that grievance progressed through the contractual grievance procedure, which culminated in arbitration. Moreover, there is no basis for us to find that the availability of the Status Log Sheets either impacted the ability of the Petitioner to present her grievance, or would have affected the outcome of the arbitration. As noted above, even if we assume that the documents would have corroborated Petitioner's testimony at the arbitration hearing, the fact remains that the arbitrator concluded that Petitioner's duties, as described by her, were not substantially different from those set forth in her job description as an Assistant Chemist. Therefore, we find that the alleged falsification of documents did not interfere with Petitioner's rights under NYCCBL § 12-305. We dismiss the interference claim against the City, any other remaining claims under the NYCCBL. Accordingly, we dismiss the improper practice petition in its entirety.

ORDER

Pursuant to the powers vested in the board of Collective Bargaining by the New York City Collective Bargaining law, it is hereby

ORDERED, that the improper practice petition docketed as BCB-2517-05, be and the same hereby is, dismissed in its entirety.

Dated: New York, New York
April 6, 2006

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER